

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 29 August 2006

BALCA Case No.: 2005-INA-140
ETA Case No.: P2004-NJ-02510690

In the Matter of:

MASON TECH LLC
(formerly MASON TECH CORPORATION),¹
Employer,

on behalf of

SERGIO GUAMAN,
Alien.

Certifying Officer: Dolores DeHaan
New York, New York

Appearance: Mariusz Zielonka, Owner²
Pro se for the Employer

Before: **Burke, Chapman, and Vittone**
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from an Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of its application for labor certification. Permanent alien labor certification is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal

¹ On the Application for Alien Employment Certification, Employer's name was initially listed as Mason Tech Corporation (AF 191). However, the documents submitted on rebuttal (e.g., tax returns, W-2 forms) indicate that the name was changed to Mason Tech LLC (AF 94-172).

² Although "Cassandre C. Lamarre" is named on the Application for Alien Employment Certification as Employer's Agent, (AF 192) the Request for Review was filed by Mr. Zielonka (AF 1-2).

Regulations (“C.F.R.”).³ We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in the appeal file ("AF"), and any written arguments. 20 C.F.R. §656.27(c).

STATEMENT OF THE CASE

On February 19, 2002, the Employer, Mason Tech LLC, filed an application for labor certification to enable the Alien, Sergio Guaman, to fill the position of “Block Mason,” which was classified by the Job Service as “Bricklayer” (AF 191). The Employer set forth a basic pay rate of \$33.00 per hour and a 40-hour work week from 7:30 a.m. to 4:30 p.m. (AF 191, Items 10-12). The Employer required three years of experience in the job offered (AF 191, Item 14). The application was submitted with a request for reduction in recruitment (“RIR”) processing (AF 177).

On February 9, 2005, the CO issued a Notice of Findings ("NOF"), in which she approved the Employer's request for RIR processing, but proposed to deny certification on the grounds, *inter alia*, that (1) the Employer had not established that the job opportunity meets the definition of “Employment” as set forth in Section 656.3, since Employer did not document that there is bona fide, permanent, full-time year-round work for an employee other than oneself; and (2) the Employer did not document that the job opportunity has been and is clearly open to any qualified U.S. worker under Section 656.20(c)(8). (AF 174-176). The Employer submitted its rebuttal thereto on or about March 14, 2005 (AF 92-173). However, in the Final Determination, dated March 17, 2005, the CO found the rebuttal unpersuasive and denied certification (AF 90-91). On or about March 29, 2005, the Employer requested a review of the denial (AF 1-89). Subsequently, this matter was forwarded to the Board of Alien Labor Certification Appeals. On May 31, 2005, we issued a Notice of Docketing and Order Requiring Statement of Position or Legal Brief. Although Employer did not respond, the grounds for the appeal are set forth in the request for review. Accordingly, we will consider this case on its merits.

³ This application was filed prior to the effective date of the “PERM” regulations. *See* 69 Fed. Reg. 77326 (Dec. 27, 2004). Accordingly, the regulatory citations in this decision are to the 2004 edition of the Code of Federal Regulations published by the Government Printing Office on behalf of the Office of the Federal Register, National Archives and Record Administration, 20 C.F.R. Part 656 (Revised as of Apr. 1, 2004), unless otherwise noted.

DISCUSSION

In the NOF, the CO cited applicable regulations, as set forth above, and stated, in pertinent part:

Since bricklayers and block masons are often seasonal, employer must document how he can guarantee permanent full-time employment performing the job duties shown in item 13 of the 7-50A form. Such documentation must include, but is not limited to, the area(s) of construction he specializes in, the number of workers he has had in 2002, 2003, 2004 and currently, their names and job duties, whether full or part-time, employee or non-employee. He must furnish copies of W-2 or 1099-MISC forms, whichever are applicable, for 2002, 2003 and 2004. He must submit signed copies of his Federal tax returns for 2002, 2003 and, if available, 2004. As evidence of year-round permanent employment performing the required job duties, he must furnish copies of contracts, invoices, etc for 2002, 2003, 2004 and currently; these documents must include the winter months.

(AF 175-176).

Employer's rebuttal consisted of a letter, dated March 8, 2005, signed by the Employer's President, Mairusz Zielonka (AF 94), a New Jersey Business Registration Certificate for State Agency and Casino Service Contractors (AF 95), a New Jersey Certificate of Authority regarding Sales & Use Taxes (AF 96), a W-3 form for 2002 (AF 97), numerous W-2 forms for 2002 and 2003 (AF 97-133), 1099-MISC forms for 2004 (AF 134-140), and unsigned copies of various Employer's Quarterly Federal Tax Returns with related documents (AF 141-172).

In the Final Determination, the CO denied certification, stating in pertinent part:

The rebuttal includes 22 W-2 forms for 2002 and 50 W-2 forms for 2003. No 1099-MISC forms were submitted for 2002 and 2003. The employer also submitted 7 1099-MISC forms and no W-2 forms for 2004. He has not furnished any information concerning the area(s) of construction he specializes in, the number of workers he has had in 2002, 2003, 2004 and currently, their names and job duties, whether they are full or part-time, employee or non-employee. We note that the seven 1099-MISC forms for 2004 show that the workers named on these forms received Non-employee Compensation. The employer also has not

furnished any copies of contracts, invoices, etc for 2002, 2003, 2004 and currently as evidence of full-time permanent year-round employment as instructed in the NOF.

Since the employer has not furnished all of the documentation requested in the Notice of Findings, and the documentation he did submit is not sufficient, he has failed to satisfactorily document that he can guarantee permanent full-time year round work performing the job duties by an employee other than oneself and that a bona fide permanent full time position existed to which U.S. workers could be referred if available. The application is denied.

(AF 91).

In his “Request for Review” letter, dated March 29, 2005, Mr. Zielonka correctly noted that lists of workers were included together with the Employer’s Quarterly Federal Tax Returns. Furthermore, we surmise from the evidence presented in rebuttal that the individuals who received W-2 forms were “employees,” whereas those who received 1099-MISC forms were “non-employees.” However, the CO also asked the Employer to provide other relevant information regarding these individuals, such as whether they worked full or part-time, and the nature of their duties. Moreover, the CO explicitly requested that the Employer provide copies of contracts, invoices, etc., in order to document that the job opportunity entailed full-time, year-round work. However, the Employer failed to comply with the CO’s clear instructions.

The Board has consistently held that a petitioning employer must provide directly relevant and reasonably obtainable documentation requested by a CO. *See, e.g., Gencorp*, 1987-INA-659 (Jan. 13, 1988)(en banc); *Kogan & Moore Architects, Inc.*, 1990-INA-466 (May 10, 1991); *Bob’s Chevron*, 1993-INA-498 (May 31, 1994). Since the Employer has failed to provide such documentation, we find that labor certification was properly denied.⁴

⁴ With the request for review, Employer’s president belatedly submitted some additional information. However, it is well settled that evidence submitted after the issuance of the Final Determination together with the request for review cannot be considered on appeal pursuant to 20 C.F.R. §656.27(c). *See, e.g., Memorial Granite*, 1994-INA-66 (Dec. 23, 1994); *ST Systems, Inc.*, 1992-INA-279 (Sep. 2, 1993); *HGHB*, 1992-INA-267 (June 3, 1993). Moreover, we note that the Employer still did not provide any contracts or invoices, nor did Employer submit any W-2 forms for 2004. Furthermore, most of the W-2 forms for 2002 and 2003 revealed wages which are substantially less than those of a full-time bricklayer, which suggest that these workers are either not bricklayers and/or that they did not engage in full-time work. Based on the stated basic pay rate of \$33.00 per hour for 40 hours (AF 91), a *full-time* bricklayer would have an annual income of \$68,640.00.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of the Panel by:

A

Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

**Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002**

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within ten days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.